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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

R. ANTHONY MARRESE, M.D., and BONE AND JOINT SURGEONS, INC.,

Petitioners,

v.

INTERQUAL, INC., et al.,

Respondents.

REPLY TO THE BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

The respondents' brief has highlighted the reasons why this Court should review the decision of the Seventh Circuit Court of Appeals. "Indirect" administrative review, consisting of a hospital governing board's report of an adverse recommendation by a peer review committee to the Medical Licensing Board of the State of Indiana, and a Hospital Licensing

Council's possible review of hospital records represents a radical departure from this Court's pronouncement of the doctrine of "active state supervision." This type of "indirect" administrative review provides no opportunity for Indiana to implement its policy of providing quality medical care to its citizens since there exists no mechanism within the state administrative process to review, reverse or affirm, peer review decisions.

Courts, on the other hand, are constitutionally incapable of implementing or supervising state policies but rather are limited to adjudicating the case or controversy placed before it by the parties. A court may not, as suggested by the Seventh Circuit, provide active state supervision of the peer review process. Furthermore, Indiana's grant of immunity from civil lawsuits for those involved in peer review extends only to peer review activities conducted in "good faith." In addition, Indiana did not attempt to limit to state courts any civil action brought because the proceedings were conducted in "bad" faith. Since federal courts have an unflagging obligation to exercise the jurisdiction given them, the Seventh Circuit errored by rejecting its congressionally imposed jurisdictional mandate.

The state court action brought by Dr. Marrese was one for preliminary injunction brought after the dismissal of this action but before the commencement of the peer review proceeding. A state court finding that he had failed to show the panel members' "malice" at that time does not in any way address the issue of whether or not those peer review proceedings were conducted in "good faith." Nevertheless no court, state or federal, has considered the facts or issues raised in this litigation.

In light of the Indiana Legislature's grant of immunity from civil action only to the extent that the peer review activities are conducted in "good faith" there exists *no* conflict between the state policy of providing high quality medical care for its citizens and the federal antitrust laws.

ARGUMENT

The respondents' brief in opposition ("Opposition") to the petition ("Petition") clearly demonstrates that the alleged anticompetitive actions of respondents were those of private parties masquerading their anticompetitive activities as "state action." Indeed, the State of Indiana has clearly stated its position in the *Amicus* brief that the perversion of the peer review process for anticompetitive purposes is not consistent with state policy. This decision, if not reviewed, will spawn a new generation of confusion in the area of the "state action immunity" doctrine. The reasons for this are addressed in this reply.

I. "INDIRECT" ADMINISTRATIVE REVIEW IS NOT "ACTIVE STATE SUPERVISION" NOR CAN SUCH SUPERVISION EVER BE THE PROVINCE OF THE COURTS

A) "INDIRECT" ADMINISTRATIVE REVIEW CONSISTING OF A REPORT OF AN ADVERSE RECOMMENDATION TO A MEDICAL LICENSING BOARD OR A HOSPITAL LICENSING COUNCIL'S POSSIBLE READING OF A PEER REVIEW RECORD, WHEN NEITHER AGENCY HAS THE RIGHT TO AFFECT A PEER REVIEW DECISION, CANNOT BE "ACTIVE STATE SUPERVISION" OF SUCH A DECISION WITHIN THE MEANING OF *PARKER v. BROWN.*

The respondents have attempted to defend the Seventh Circuit's unprecedented decision on the basis that "active state supervision" can be equated to "indirect administrative review" because a hospital governing board reports any adverse findings of a peer review committee to the Medical Licensing Board and because the Hospital Licensing Council has the right to make periodic inspections of a hospital and inspect hospital

documents. Because neither the Medical Licensing Board nor the Hospital Licensing Council has the right to affect in the slightest way a hospital's peer review decision, the Seventh Circuit's theory is unsupported by case law and contrary to the interpretation given this procedure by the highest law enforcement officer in the State of Indiana, its Attorney General.

In *Hoover v. Ronwin*, ____ U.S. ____, 104 S.Ct. 1989, 80 L.Ed. 2d 590 (1984), this Court found "active state supervision" because the Arizona Supreme Court had reserved to itself the crucial decision of whether to admit or not to admit an applicant to the Arizona Bar, the very procedure challenged by Mr. Ronwin.

Similarly, in *Parker v. Brown*, 317 U.S. 341, 353 (1943), the State Commissioner of Agriculture was charged with determining the supply and price of all raisins sold under the legislatively approved marketing program.

Conversely, in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980), the state's failure to establish prices, review the reasonableness of price schedules, regulate the terms of fair trade contracts, monitor market conditions and re-examine the program all were found to show a lack of active state supervision of that price setting policy.

In the instant case the respondents' decision to remove Dr. Marrese's from the Hospital staff was exclusively their own: that decision became effective when made and neither the state nor any of its agencies were involved in that decision-making process in any way nor did they review or regulate the circumstances or the reasonableness of that decision. Neither the Medical Licensing Board nor the Hospital Licensing Council were authorized to name the hearing panel nor name a representative to that panel.

The operative decision, to remove Dr. Marrese from the Hospital staff, was made by private parties and not by a

governmental body and neither the Medical Licensing Board nor Hospital Licensing Council had a mechanism to review that decision. In these circumstances the respondents' novel doctrine of "indirect administrative review" must be regarded as merely a clever confusion of the supervision issue. Whatever that terms means, it cannot conceal the absence of the necessary *active state supervision* in this case.

B) A COURT IS CONSTITUTIONALLY INCAPABLE OF PROVIDING "ACTIVE SUPERVISION" OF THE PEER REVIEW PROCESS

Based upon the Seventh Circuit's opinion in the instant case (App. 39-43) respondents argue that "active state supervision" may be found when there exists a possibility of state judicial review (Opp. 24). This represents the ultimate in total perversion of the principals of *Parker v. Brown.* The Seventh Circuit's expansive interpretation of "active state supervision" will give birth once again to "a crazy quilt of desperate rationales and rubrics," Handler, *Antitrust-1978,* 78 Columbia Law Review 1363, 1374 (1978), since a court is constitutionally incapable of either implementing or supervising a state policy favoring quality medical care. It is limited to adjudicating the case or controversy placed before it by the parties.

Although the Seventh Circuit felt that the state policy favoring peer review would be better enforced in the state court, the Indiana Legislature was silent on this issue and extended state court immunity only if those proceedings were conducted in good faith. The lack of such a legislative expression of preference should have alerted the Seventh Circuit to the dangers of entering on such an unchartered course. In so doing the court has lost track of the fact that federal courts have an unflagging obligation to exercise the jurisdiction given them. As Justice Brennan pointed out in *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 415 (1964), to require a litigant who has properly

invoked the jurisdiction of a federal court to consider a federal claim to accept a state court's determination of his claim instead "would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts . . . ." The Seventh Circuit has failed to exercise its Sherman Act jurisdiction and for this reason alone petitioners' request for a Writ of Certiorari to that court should be granted.

II. THE STATE COURT ACTION, BROUGHT PRIOR TO THE PEER REVIEW HEARING BUT, AFTER THE FEDERAL COURTS' DISMISSAL OF THIS ACTION, HAS NO BEARING ON THE ISSUE OF "STATE ACTION" EXEMPTION

In order to avoid confusion, it must be pointed out that the state court action brought by Dr. Marrese was simply an action for preliminary injunction wherein Dr. Marrese sought to establish the "malice" of the hearing panel *prior* to the commencement of the peer review hearing.[1] The state court's

[1] In this context, it is important to note that the president of the medical staff, who initially named the hearing panel in 1982, is a defendant in this litigation. His partner was president of the medical staff in May, 1983 and he named the same panel as was named by his partner-predecessor and the alternate panel. The panel consisting of hospital staff members was composed of a physician who was a father of a witness scheduled to testify against Dr. Marrese, two physicians who were partners of witnesses scheduled to testify, one member who was noted for his strong personal bias against orthopedic surgeons performing spinal disc surgery and one who had no knowledge of spinal procedures. The past and then current president of the medical staff designated this panel notwithstanding the fact that there were at least 160 physicians on the staff of the Hospital who were not so tainted and there were approximately 200 orthopedic surgeons in the State of Indiana who were not asked to serve on the hearing panel.

The alternate panel "associated with Indiana University Medical School" consisted of only *three* rather than *five* physicians as called for in the Hospital by-laws and this panel also was hand-picked by the

(Footnote continued on following page)

finding that the composition of the amended peer review panel did not of itself prove "malice" within the meaning of the state statute is simply irrelevant for federal antitrust purposes and for the purpose of determining whether the proceedings were conducted in good faith. It has no bearing whatsoever on the issue of whether the alleged anticompetitive intent to exclude Dr. Marrese from the relevant market, to coerce conformity to anticompetitive trade practices throughout the market and to monopolize that market caused the peer review proceeding to be commenced against Dr. Marrese. Thus, assuming the truth of the allegations that the primary purposes of the peer review proceedings were to exclude a feared competitor from the market and to coerce conformity to the alleged "apprenticeship" and "prior referral" trade practices, the limited state court

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(Footnote continued from preceding page)

president of the medical staff who was a partner of a defendant in this litigation. None of the three prospective "alternate" panel members had specialized knowledge concerning adult orthopedic spinal surgery. There were in fact other very persuasive reasons for Dr. Marrese's not accepting this alternate panel which will be put in admissible, evidentiary form at the appropriate time.

The statement of respondents that a panel member was "voluntarily withdrawn" is, at best, misleading. Two panel members who were partners of defendants in this litigation and named by a defendant in this litigation and renamed by his business partner, voluntarily withdrew as panel members, one ten days before the hearing and the other during the preliminary injunction hearing in the state court. When the first panel member voluntarily withdrew the president of the medical staff named another partner of a defendant in this litigation to the panel. When the second panel member withdrew during the hearing on the preliminary injunction the president of the medical staff advised the circuit judge that he was naming another staff member as panel member but did not advise the judge that the panel member he was naming was a defendant in this litigation. That defendant withdrew from the panel on the morning that the peer review hearing was to commence when the Circuit Judge, off the record, withdrew his approval of that panel member. The hearing proceeded with a panel of four rather than five members, as called for in the by-laws.

finding could not prevent the imposition or alter the rule of per se federal antitrust liability.

As courts have consistently held, the "good faith" or "reasonableness" of any practice that comes within one of the per se categories is no defense to liability. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 342 (1897); *Marjorie Webster Jr. College v. Middlestates Assn. of Colleges*, 302 F.Supp. 459, 466 (D.C.Cir. 1969) *rev'd on other grounds*, 432 F.2d 650 (D.C.Cir. 1970), *cert. denied*, 400 U.S. 965 (1970). Here, of course, there has been no finding of "good faith" in the institution, prosecution or outcome of the Deaconess Hospital's peer review proceedings and no court, state or federal has reviewed the facts or issues raised in this litigation.

III. PETITIONERS ARE NOT CHALLENGING THE CONCEPT OF MERIT-BASED PEER REVIEW BUT RATHER THE ABUSE OF THE PEER REVIEW PROCESS BY RESPONDENTS FOR THE PURPOSE OF REMOVING A HIGHLY QUALIFIED COMPETITOR FROM THE HOSPITAL STAFF

Respondents argue that since peer review is authorized by the Indiana Legislature (Opp. 20) and since the Indiana Legislature anticipated that "some physicians would be involuntarily removed from hospital staffs" (Opp. 18-19), all anticompetitive conduct resulting from peer review activities should go unchecked. This argument ignores the fact that federal regard for state policy does not require antitrust immunity if application of the antitrust laws would not be inconsistent with state policy. By authorizing "good faith" peer review in order to assure quality medical care, the Indiana Legislature was sanctioning merit-based exclusion of physicians from hospital medical staffs. Petitioners are not challenging the peer review process itself, but rather the perversion of that process by respondents (Pet. 10-11). Since the Indiana policy favoring peer review is founded upon concern for the delivery of quality medical services, it is in that context that the Indiana Legisla-

ture can reasonably be said to have "anticipated that some physicians would be involuntarily removed from hospital staffs" (Opp. 18-19). Clearly though, a non-merit-based removal of a competitor from a medical staff who is an economic threat to the persons recommending that removal was not sanctioned by the Indiana Legislature. Therefore, the state's statute authorizing peer review is consistent with the federal antitrust law and there is no issue of state preemption as argued in respondents' brief (Opp. 28). See *United States v. Erie County Malt Beverage Dist. Ass.*, 264 F.2d 731 (3rd Cir. 1959).

This "state purpose" analysis is entirely consistent with this Court's recent decision in *Town of Hallie v. City of Eau Claire*, ____ U.S. ____, 82-1832 (1985), 53 L.W. 4418, where the Wisconsin statutes "clearly articulated" a state policy authorizing a city to construct and maintain sewage systems, to describe districts to be served and to refuse to serve an unannexed area. The state was said not to be merely neutral on the challenged issue, but clearly contemplated that a city may engage in anticompetitive conduct. Similarly in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 789 (1975), the court refused to immunize a bar association minimum fee schedule on the grounds that the Virginia Supreme Court's general grant of authority to the bar to issue ethical opinions was not intended to authorize binding price fixing.

CONCLUSION

The State of Indiana, not unlike every other state in this nation, has an extensive statutory and regulatory scheme concerning medical services. Hospitals are the focal point of modern health care, providng the equipment and support personnel necessary for today's sophisticated medical procedures. Access is therefore indispensable to medical practitioners. These facts are recognized by consumers of medical services who increasingly are seeking more advanced medical procedures and a greater variety of treatment modes. Staff members, cognizant of this fact, and of their advantage as a result of their staff membership, will be encouraged, by this decision, to recommend the denial of staff privileges or the removal of a staff member for reasons totally unrelated to merit. The consumer will therefore suffer because a hospital medical staff will be able to control the type of medical services delivered by a hospital to a community, not because the services are inferior but rather because other staff members are incapable of forming these procedures. This Court should avail itself of the opportunity presented to develop guidelines for the protection of consumers of medical services and those entering or presently in the medical profession. Petitioners therefore requests that this court issue a Writ of Certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

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